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March 27, 2003

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Federal Communications Commission
Office of Secretary**BY HAND DELIVERY**

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Re: CC Docket Nos. 01-338 and 96-98

Dear Ms. Dortch:

Birch Telecom, Inc. ("Birch") is writing to respond to the letter filed in this docket on March 17, 2003 by SBC Communications, Inc. ("SBC") concerning statements made by Birch in its December 9, 2002 and February 7, 2003 ex partes. In those ex partes, Birch addressed, among other things, the operational impairments associated with SBC's hot-cut performance. In that context, Birch stated that SBC has "an aggregate porting limit of 10 numbers (e.g. 10 analog lines; 1 DS-1 trunk) per central office per hour (for ALL CLECs)." SBC characterizes Birch's statement as a "false statement" and urges an investigation by the Enforcement Bureau. Birch objects not only to the substance of SBC's letter—Birch stands by the statement it made in its ex partes—but also to the manner in which the matter has been handled by SBC.

Before addressing the particulars of SBC's letter, it is important to place this issue in its proper context. SBC has seized on a single line in a record containing literally thousands of pages in an effort to undermine the finding that CLECs face severe operational impairments if denied access to unbundled switching. While, as discussed below, Birch stands by the statement it made, there is no question but that the record in this proceeding supports a finding of impairment with or without the single line that SBC is questioning. Indeed, even laying all of the record evidence of operational impairment aside, the evidence of economic impairment alone is more than sufficient to justify the Commission's action. The Commission should not allow its attention to be diverted by this eleventh-hour effort by SBC to interject confusion into a clear record.

Turning to the substance of SBC's letter, the letter accurately relates that Birch was verbally told by an SBC employee of the ten line per hour per central office limitation on SBC's ability to perform hot cuts. While no written record was made and

¹ Letter from Genevieve Morelli to Marlene Dortch, Secretary, FCC, CC Docket No. 01-338 (December 9, 2002); Notice of Ex Parte Presentation to Hon. Kathleen Abernathy by Dave Scott, President and CEO, and Greg Lawhon, Senior Vice President and General Counsel, Birch Telecom, CC Docket No. 01-338 (February 7, 2003).

Birch is therefore unable to point to which SBC employee made the statement, the fact remains that the statement was made. The assertion made by counsel for SBC that "SBC has no set limit on the number of hot cuts it will perform"² is simply inconsistent with what Birch was told.

These types of operational limitations are consistent with Birch's experience in the hot-cut and other, related contexts. Birch encountered a similar limitation in the context of a manual customer migration effort to convert existing Birch customers served by Birch's switch to service provided by SBC's switch via UNE-P ("DS-0 to UNE-P migration project").³ In the DS-0 to UNE-P migration project, Birch was notified by SBC that Birch must adhere to a throughput limitation of "either six accounts or six locations per day" for the project. SBC mentions this limitation in its letter but waves it aside, explaining that the six account/six location limit is a "project"-specific limit. This assertion, which in any event is an after-the-fact recharacterization of SBC's position, illustrates that SBC does have restrictions that amount to operational impairments, whether dictated by real or SBC-imposed resource and/or other constraints.

SBC suggests that because the Birch DS-0 to UNE-P migration was done on a project basis, any limits in that context on SBC's ability to perform manual cut-overs has no bearing on SBC's ability to perform hot-cuts. In fact, the opposite is true—Birch pursued, and obtained, levels of performance beyond those that SBC initially told Birch it was willing to provide. In the end, the six account/location per day maximum represented the *best* level of performance that Birch could extract from SBC. According to SBC, it is only possible for SBC to process more orders per day if Birch is willing to accept the possibility of significant customer down-time. This obviously is as unacceptable in the context of the DS-0 to UNE-P migration as it would be in the hot-cut context (i.e., migrating active service from a Birch switch to an SBC switch). Thus, the six accounts/locations per day restriction reflects the limit of SBC's willingness or ability to process manual cut-overs, given Birch's intolerance for significant out-of-service time for its active customers being migrated. If that is the best that SBC can do when devoting extra attention to a manual process that cuts over a CLEC DS-0 customer to an SBC switch, it lends credibility to the notion that its performance is far worse—and the degree of impairment correspondingly greater—in performing hot-cuts that cut over a current SBC DS-0 customer to a CLEC pursuant to SBC's standard operating procedures.

² Letter from Christopher Heimann, Counsel for SBC, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338 and 96-98 (March 17, 2003).

³ The DS-0 to UNE-P migration project entailed migrating Birch DS0 customers from Birch's own 5E circuit switches to UNE-P, thereby utilizing SBC's switching.

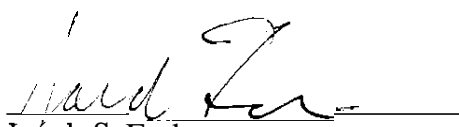
⁴ The six account/six location restriction was set out in an exchange of emails between Ms. Deborah Jewell (Birch) and Ms. Sherial Jamison (SWBT). The emails are attached as Attachment 1. In the email exchange, Ms. Jewell seeks to clarify in writing several statements made during telephone conversations between Birch and SWBT in the context of the DS-0 to UNE-P migration project. Ms. Jewell specifically represents that "Sherial requested that Birch be mindful not to send more than six accounts per day, which has apparently [has] happened" and that "we need to consider limiting our activity to either six accounts or six locations" per day. Ms. Jamison does not correct this statement. Rather, she underscores the limitation stating that "the six account or six locations really needs to be addressed again as we are finding that each location has to be set up separately and thus a lot of overlapping that even two Communications Consultants involvement may not be able to contain."

Prior to the filing of SBC's letter, Birch had provided to SBC a draft of a letter to the Commission⁵ that not only explained the original basis for Birch's statement but also pointed out that the statement was corroborated by SBC's low levels of performance with respect to the DS-0 to UNE-P migration. Birch therefore regards SBC's characterization of the statement as being a "false" "misrepresentation" as highly inflammatory. It is one thing for SBC to take the position that what Birch was told by an SBC employee was anecdotal or inaccurate, or that there has been a change in SBC's policies. It is altogether another to accuse Birch of making a false statement on the record, especially when that statement was corroborated by other related evidence.

Birch also objects to the misleading nature of SBC's letter. In relating the discussion that took place between counsel for SBC and undersigned counsel for Birch concerning Birch's draft letter to the Commission, SBC fails to mention a key point: the discussion ended with the parties agreeing that Birch would contact Commission staff to seek the required approval for its intended filing.⁶ Birch began that process immediately. Due, however, to an exchange of calls with Commission staff over the following two business days, and then the need to obtain further approvals from other offices within the Commission, Birch was still in the process of obtaining approval for its filing when SBC filed its March 17th letter. Contrary to SBC's statement that it was unsure "when or if" Birch intended to make its filing, SBC knew full well that Birch was obtaining the required pre-approval when it preemptively filed the March 17th letter.

SBC urges the Commission to refer this matter to the Enforcement Bureau. While Birch fully stands by its statement and does not believe that an Enforcement Bureau investigation is warranted, Birch will of course fully cooperate with the Commission however it decides to proceed.

Respectfully submitted,

By: 
Jacob S. Farber
Counsel for Birch Telecom, Inc.

Enclosures

cc: Dan Gonzalez
William Maher
Michelle Carey
David Solomon
Maureen Del Duca
Christopher Heimann

A copy of the letter is attached as Attachment 2. Birch notes that the letter was provided to **SBC** in confidence and bore a header stating "CONFIDENTIAL DRAFT - Not For **Public** Distribution." Notwithstanding that clear label, SBC's March 17th letter quotes extensively from the draft letter.

⁶ See 47 C.F.R. § 1.1204(a)(10).

ATTACHMENT 1

From: JAMISON, SHERIAL K (SWBT) [mailto:sj5241@sbc.com]
Sent: Tuesday, August 20, 2002 5:33 PM
To: 'Jewell, Deborah'; 'Moore, Tim'; 'Jacobson, Diane'; 'Green, Eric';
'Weiner, Ken'; 'Watts, Jelinda'; 'Cronk, Patricia'; STREET, BEATTIE O
(SWBT); WESLEY, MARISA (SWBT); DAVIS, MICHELLE (SWBT)
Subject: RE: DSO -> UNE/P Migration -- Follow Up Notes to 8/15 Call

Deb,

Maxine is currently out of the office on maternity leave but we expect her back in less than 2 weeks.

All other issues appear to be as discussed. The six account or six locations really needs to be addressed again as we are finding that each location has to be set up separately and thus lots of overlapping that even two Communications Consultants involvement may **not** be able to contain.

Thanks
Sherial

-----Original Message-----

From: Jewell, Deborah [mailto:DJewell@birch.com]
Sent: Tuesday, August 20, 2002 3:26 PM
To: Moore, Tim; Jacobson, Diane; Green, Eric; Weiner, Ken; Watts, Jelinda; Cronk, Patricia; JAMISON, SHERIAL K (SWBT); STREET, BEATTIE O (SWBT); WESLEY, MARISA (SWBT); DAVIS, MICHELLE (SWBT)
Subject: DSO -> UNE/P Migration -- Follow Up Notes to 8/15 Call

Afternoon!

I wanted to recap a few side bar conversations relative to the open issues from our 8/15 call:

- * FAX confirmation process
 - Sherial has referred this issue to the RCC group.
- * Late return of project numbers:
 - Sherial will be adding another communication consultant to the project to assist Michelle with the work load
 - Sherial requested that Birch be mindful not to send more than six accounts per day, which has apparently has happened
 - The LSC is finding that many accounts have multiple locations and each location may have multiple lines. The LSC has allocated one hour per cut, so we need to consider limiting our activity to either six accounts or six locations
- * Sherial asked that Eric confirm how he's calculating the due date interval. Her belief is that our six day interval should be based on business vs. calendar days.

Last, Sherial asked that all future spreadsheets showing the upcoming cuts he sent to all four **of** the following people in the LSC:
Beattie Street bs2001@txmail.sbc.com

Michelle Davis md9828@txmail.sbc.com

Audrey Dones ad2963@txrnail.sbc.com

Maxine Feaster rnf4725@txmail.sbc.com

(Sherial, when I called to confirm Maxine's e-mail address, they informed me she was out on maternity leave. Did I **get** the wrong name?)

If there are additional issues that need to be addressed **prior** to Thursday's call, please tee them up through e-mail, copying those on this distribution list. Thanks!

ATTACHMENT 2

DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP
2101 L Street NW • Washington, DC 20037-1526
Tel (202) 785-9700 • Fax (202) 887-0689

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E-Mail Address: Farber.h@dsmo.com

March 11, 2003

**CONFIDENTIAL DRAFT –
Not For Public Distribution**

Christopher M. Heimann, General Attorney
SBC Communications, Inc.
1401 I Street, N.W.
Washington, D.C. 20095

Dear Mr. Heimann:

I have been asked by Birch Telecom, Inc. ("Birch") to respond to your March 3, 2003 letter to Genevieve Morelli, wherein you requested that Birch provide an explanation for a statement concerning SBC's limited ability to perform hot-cuts on a large-scale basis made in ex parte presentations in CC Docket No. 01 -338.'

Birch was told of this limitation by an employee of SBC. Unfortunately, it appears that no written record of the exchange was made at the time, so Birch is unable to provide an exact source.

Birch does possess, and has attached to this letter, documentation of a limitation expressed by SBC in the context of a manual customer migration effort to convert existing Birch customers served by Birch's switch to service provided by SBC's switch via UNE-P ("DS-0 to UNE-P migration project").' The DS-0 to UNE-P conversion process is analogous to that required for a coordinated hot-cut customer migration, where a customer's loops is cut-over from SBC's switch to a CLEC's switch, in that both cases the customer is migrated from one local provider's switch to another's. In the DS-0 to UNE-P migration project, Birch was notified that

¹ Letter of Genevieve Morelli to Marlene Dortch, Secretary, FCC (December 9, 2002); Notice of Ex Parte Presentation to Hon. Kathleen Abernathy by Dave Scott, President and CEO, and Greg Lawhon, Senior Vice President and General Counsel, Birch Telecom (February 7, 2003). In particular SWBT sought justification for the statement that Southwestern Bell Telephone (SWBT) "has an aggregate porting limit of 10 numbers (e.g., 10 analog lines; 1 DS-I trunk) per central office per hour (for ALL CLECs)."

The DS-0 to UNE-P migration project entailed Birch migrating Birch DSO customers from Birch's own 5E circuit switches to UNE-P because it has proven uneconomical to serve individual analog loop customers through self-provisioned switching even where, as here, the cost of the switch is sunk. Birch continues to provide service to DS-I and other high-capacity digital loop customers using its own switches.

